SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 680

REBECCA SIMON WOLFSOHN, Executrix for the Estate of Joel David Wolfsohn, Deceased, *Petitioner*

v.

GREGORY HANKIN, *pro se*, and PROFESSIONAL INVESTMENT MANAGEMENT COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit dismissing the appeal on the ground of lack of jurisdiction.

OPINIONS OF THE COURT

The opinion of the Court of Appeals, No. 17,449, is reported at 321 F. 2d 393 (1963) and set forth in the Appendix at p. 1a.

The District Court judgment is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1963. (A. 58, 76). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Petition for rehearing denied September 18, 1963.

QUESTION PRESENTED

Does Rule 60(b)(6) of the Federal Rules of Civil Procedure compel reversal of the ruling of the Court of Appeals which dismisses the appeal for lack of jurisdiction, relying upon Rule 6(b), 59(b), 60(b) and 73(a)?

RULES AND REGULATIONS INVOLVED

Rule 6(b) of the Federal Rules of Civil Procedure reads as follows:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion
>
> (1) with or without motion or notice order the period enlarged if *request* therefor is made before the expiration of the period originally prescribed or as extended by a previous order or
>
> (2) upon motion *made after the expiration of the specified period* permit the act to be done where the failure to act was the result of excusable neglect; but it may not *extend the time* for taking any action under Rules 25, 50(b), 52(b), 59(b), (d) *and* (e), 60(b), *and* 73(a) *and* (g), *except to the extent and under the conditions stated in them.*

Rule 59(b) reads, "A motion for a new trial shall be served not later than 10 days after the entry of the judgment".

Rule 60(b)(2)(6) reads in part, "On Motion *and* upon such terms as are just, *the court* may relieve a party or his legal representative from a *final* judgment, order, or proceeding *for the following* reasons; . . . (2) *newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);* . . . (6) *any other reason justifying relief from the operation of the judgment* . . ."

Rule 73(a), provides in applicable part as follows:

> "The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59."

Rule 19(1)(b) of the Supreme Court of the United States reads,

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of Appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in con-

flict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision." (Character of reasons for considering petitions).

STATEMENT OF THE CASE

The District Court had jurisdiction in the case by reason of the amount involved and by Section 11-306 of the District of Columbia Code.

Petitoner is the widow of Joel D. Wolfsohn and executrix of his estate. Mr. Wolfsohn was a distinguished member of the bar of the District of Columbia, having entered the practice after culmination of outstanding services as Assistant Secretary of the Interior in the Truman Administration. Petitioner's complaint alleged, *inter alia*, that the respondents had wrongfully terminated her husband's contract of employment and asked for appropriate relief. The case was heard on cross motions for summary judgment.

A vital issue of jurisprudence is here involved but the facts are very simple as follows:

1. On May 7, 1962 the District Court entered an order for summary judgment in favor of respondents. (R. 2)

2. On said date, petitioner's attorney was in the hospital recovering from an illness involving major surgery.

3. On May 11, 1962 petitioner filed a motion to extend the time either to move to vacate or ask for rehearing of the order of May 7, 1962. This motion was dictated by petitioner's counsel from his hospital bed. Counsel for the third-party defendants con-

sented to an order extending such time by writing "no objection" and respondents' counsel acknowledged in writing his receipt thereof. (R. 2)

4. An order granting a 30-day extension of time in which to "either move to vacate or ask for rehearing" was entered on May 11, 1962. (R. 2)

5. At no time did respondents object to the entry of said order extending said time.

6. On June 11, 1962 petitioner filed her motion to vacate and for a rehearing, coupled with an allegation of newly discovered evidence. No hearing was granted on this motion, despite petitioner's request for one. (R. 2)

7. On October 12, 1962 the District Court denied petitioner's motion of June 11, 1962. (R. 3)

8. On November 3, 1962 petitioner filed her notice of appeal from the order of October 12, 1962. (R. 3)

9. Respondent Hankin in his brief to the Court of Appeals, filed on May 3, 1963, stated that

> ". . . the order appealed from, rendered on October 12, 1962, is an order denying a motion for reconsideration. The order which was sought to be reconsidered was rendered on May 7, 1962. The time for taking an appeal from that order expired on November 12, 1962."

10. On May 29, 1963, the Court of Appeals dismissed the appeal on the ground that the notice of appeal was untimely filed. (A. 58, 76).

11. A motion for rehearing of that dismissal was denied by the Court of Appeals on September 18, 1963. (R. 74, 75)

12. Petitioner seeks a review by this Court of the dismissal by the Court of Appeals.

REASONS FOR GRANTING CERTIORARI

This case involves an important interpretation of the Federal Rules of Civil Procedure. It affects the orderly administration of justice by the courts insofar as the petitioner's rights are concerned. It involves this Court's obligations under its own rules to exercise its power of supervision over lower courts which have departed from an accepted and usual course of judicial procedure. (Rule 19(1)(b) Supreme Court Rules).

Petitioner seeks a review of the decision of the Court of Appeals dismissing her appeal on May 29, 1963, and order denying rehearing entered September 18, 1963. The order granting summary judgment, from which petitioner appealed, was entered on May 7, 1962. Four days later, on May 11, 1962, petitioner moved the court for an extension of time in which to move to vacate or ask for rehearing . . . This motion was dictated by petitioner's counsel from his hospital bed and on May 11, 1962 the District Court entered an order granting an extension of 30 days and the motion was filed in that time. No objection was raised and in fact respondent Hankin understood and so stated in his appeal brief that the time for taking an appeal expired on November 12, 1962.

In its decision the Court of Appeals misconstrued the provisions of Rule 6(b) of the Federal Rules of Civil Procedure in stating that the period of time within which a motion for a new trial under Rule 59(b) of the Federal Rules of Civil Procedure (which includes a motion for rehearing) may not be enlarged by the court.

The record shows that petitioner moved under rule 6(b)(1), that is, prior to the expiration of the 10-

day period to extend the time to file a motion for rehearing for extraordinarily good cause, to wit, the confinement of petitioner's counsel in a hospital bed, recuperating from surgery. Obviously the Court of Appeals erroneously relied on 6(b)(2) when it stated that the period of time (for moving for a new trial) might not be enlarged. Section 2 of Rule 6(b) refers to motions made *after* the specified period in which the act to be done is permitted. The Court's reliance on *Slater* v. *Peyser* (91 U.S. App. D.C. 314, 200 F. 2d 360 (1952)) is misplaced since in that case the appellants did not act within the ten days allowed.

Even if this court were to hold that the time may not be enlarged under Rule 6(b) F.R. Civ. P., the Court of Appeals erred in failing to consider the applicability of Rule 60(b)(6) F.R. Civ. P. which authorizes relief from a final judgment, order or proceeding for "any other reason justifying relief from the operation of the judgment". While petitioner agrees that the motion under Rule 60(b) is addressed to the sound discretion of the court she alleges that this discretion was abused by the Court of Appeals. This abuse of discretion occurred despite the action of the trial court in granting the extension of time to petitioner and after a panel of the Court of Appeals had considered the same point and had denied a motion to dismiss the appeal in a *per curiam* order entered January 25, 1963.

Petitioner asserts that the action of the Court of Appeals denies her due process of law and adversely affects her rights. The action of the Court of Appeals was objectionable on the basis of the rules themselves and on the basis of the record before the court.

The action of the Court of Appeals compels this Court to exercise its power of supervision under its Rule 19(1)(b). There has been a serious departure from the accepted and usual course of procedure in this case. The petitioner has been lulled into a false sense of security by an order of a District Court judge which falls squarely within the confines of the applicable rules. It prevents a District Court judge from controlling the progress of litigation where exceptional circumstances, such as illness of counsel in this case, demand. The dismissal of this case on the ground of lack of jurisdiction makes it impossible for lawyers as officers of the court to rely with assurance upon a simple procedural order of a District Court judge.

The administration of justice will be severely handicapped if this atmosphere of uncertainty is permitted to continue. No lawyer in the District of Columbia will be able to safely rely on the enlightened purposes of the Federal Rules of Civil Procedure if the District Court is deprived of the authority to grant relief in these and similar circumstances.

The notice of appeal in this case was filed November 3, 1962 which is less than the 30-day period prescribed by Rule 73(a) of the Federal Rules which time was properly computed from October 12, 1962, to wit the time when petitioner's motion for rehearing was denied. Petitioner cannot be held responsible for the long delay from May 7 to October 12, which was the time that her motion for rehearing was being considered by the trial court. This Court held in *Foman* v. *Davis* (371 U.S. 178 pp. 181, 182), which was also cited in the opinion of the Court of Appeals, that the Federal Rules of Civil Procedure reject the approach that pleading is a mere matter of technicality nd a

game of skill in which one misstep can be detrimental or fatal to a party; that the rules are based rather on the principle that the purpose of pleading is to facilitate the proper decision on the merits.

The Dismissal is in Conflict With a Recent Decision of This Court

In *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, (371 U.S. 215) cited by the Court of Appeals, a Federal District Court rendered a judgment against a party and denied a motion for a new trial while its general counsel was away and could not be reached. Within the time allowed for taking an appeal the party's local counsel applied to the District Court for an extension of time within which to appeal. The District Court granted an extension of two weeks and the notice of appeal was filed within that time. The Court of Appeals, however, dismissed the appeal on the ground that no showing of excusable neglect had been made to the District Court, that there was no basis for waiving the 30-day rule and that, therefore, the appeal was untimely filed.

This Court reversed the lower court and held that "since petitioner had relied on the District Court's ruling extending the time within which to appeal and petitioner would suffer a hardship if it were set aside, the Court of Appeals should have let it stand."

This petitioner's counsel was in the hospital when the judgment herein (which petitioner seeks to have reviewed) was entered. On the fourth day after the entry of the judgment petitioner asked the court to extend the time within which to move to vacate or ask for rehearing and a 30-day extension was granted by the District Court.

Petitioner relied on the District Court's ruling and acted within the time allowed by the court. The Court of Appeals has dismissed the appeal on the ground that the notice of appeal was not timely filed. Petitioner has suffered a hardship solely by reason of the fact that her counsel was in the hospital recovering from an illness involving surgery and from the fact that the District Court granted an extension of time by reason thereof.

This constitutes a special and important reason why certiorari should be granted.

CONCLUSION

The dismissal of petitioner's appeal is without support. Every case which the lower court relied on is in petitioner's favor. It is seriously detrimental to the effective operation of a judicial system in the District of Columbia and will cause chaos by destroying confidence in the reliability and authority of Federal District judges.

Petitioner avers that the Court's statement, "after studying the record as made, including the alleged newly discovered evidence, we find no abuse", is a gratuitous statement not essential to the appeal and should be disregarded by this Court. Petitioner is entitled to her day in court based upon the issues unprejudiced by the assertion that she has no jurisdiction to be there.

For the foregoing reasons, petitioner urges that certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,449

REBECCA SIMON WOLFSOHN, Executrix of the Estate of Joel David Wolfsohn, deceased, *Appellant*

v.

GREGORY HANKIN and PROFESSIONAL INVESTMENT MANAGEMENT COMPANY, *Appellees*

Appeal from the United States District Court for the District of Columbia

Decided May 29, 1963

Mr. Fred I. Simon for appellant.

Mr. John V. Long for appellee Hankin.

No brief was filed and no appearance was entered for appellee Professional Investment Management Company.

Before EDGERTON, *Senior Circuit Judge*, and WRIGHT and MCGOWAN, *Circuit Judges*.

PER CURIAM: "The notice of appeal being untimely filed, this court lacks jurisdiction[1] and the appeal must be dismissed.

An order granting summary judgment against appellant was entered May 7, 1962. On May 11th, on motion of appellant, the District Court signed an order purportedly extending appellant's time to move for a rehearing under Rule 59, F.R.Civ.P. On June 11th a motion to vacate and for rehearing was filed, alleging, *inter alia*, newly discovered evidence. On October 12th appellant's motion for re-

[1] *Slater* v. *Peyser*, 91 U.S. App. D.C. 314, 200 F. 2d 360 (1952); *Randolph* v. *Randolph*, 91 U.S. App. D.C. 170, 198 F. 2d 956 (1952).

hearing was denied. On November 3rd appellant filed notice of appeal. Rule 73(a), F.R.Civ.P.

Under Rule 59(b), F.R.Civ.P., a "motion for a new trial," which term includes a motion for rehearing, must be served "not later than 10 days after the entry of the judgment." This period of time may not be enlarged by the court. Rule 6(b), F.R.Civ.P. Since the appellant's motion for rehearing was not filed until June 11th, 35 days after summary judgment, it came too late to be considered or to interrupt the running of the time for appeal.[2] *Slater* v. *Peyser, supra*, Note 1. Since appellant did not file her notice of appeal until November 3rd, it came too late to be considered as an appeal from the judgment of May 7th.[3] See Rule 73(a), F.R.CivP.

Treating appellant's motion of June 11th as one for relief from a final judgment under Rule 60(b), F.R.Civ.P., appeal from the October 12th denial of which would be timely, we still affirm the disposition of the District Court. The motion under Rule 60(b) addresses itself to the sound discretion[4] of that court, and, after studying the record as made, including the alleged newly discovered evidence, we find no abuse.

So ordered.

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[2] Compare *Harris Lines* v. *Cherry Meat Packers*, 371 U.S. 215 (1962).

[3] Appellant's Notice of Appeal stated that she was appealing from the order of October 12th. Compare *Foman* v. *Davis*, 371 U.S. 178, 180-182 (1962).

[4] *System Federation* v. *Wright*, 364 U.S. 642, 645-648 (1961); *McLeod* v. *D.C. Transit System, Inc.*, 108 U.S. App. D.C. 399, 283 F. 2d 194 (1960).

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v.

GREGORY HANKIN and PROFESSIONAL INVESTMENT MANAGEMENT COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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STATEMENT IN OPPOSITION

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IN THE

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REBECCA SIMON WOLFSOHN, Executrix for the Estate of JOEL DAVID WOLFSOHN, Deceased, *Petitioner,*

v.

GREGORY HANKIN and PROFESSIONAL INVESTMENT MANAGEMENT COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT HANKIN'S STATEMENT IN OPPOSITION

THE FACTS

On December 26, 1961, Petitioner brought action (JA 3-6)* against Professional Investment Management Company (PIMCO) for breach of contract of employment between it and Petitioner's decedent, Joel D. Wolfsohn, as Secretary of the Corporation. Joined as defendants were Consumers Investment Fund, Inc.

* (JA ....) denotes the page references to the Appendix filed by Petitioner in the Court below. (SA ....) denotes page references to the Supplemental Appendix filed by the Respondent in the Court below.

(CIF) and Gregory Hankin (President of Pimco and Executive Vice-President of CIF), although neither of them was a party to the contract alleged to have been breached.[1]

The gravamen of the complaint was that under PIMCO by-laws only Board members could be officers of the Corporation; that Hankin "withheld" decedent's reelection as a member of the Board, thus rendering his contract a "nullity and impossible to perform"; and that Hankin unfairly accused the decedent of failing to perform his duties as Secretary, thus creating an intolerable situation, which forced the decedent to submit his resignation (JA 4).

Respondent Hankin, as General Counsel of the two corporations, defended the action brought against them.[2] He also filed an answer on his own behalf

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[1] After the District Court granted summary judgment in favor of all three defendants, Petitioner entered into an arrangement with one Douglas F. Thornsjo who succeeded Mr. Hankin as chief executive officer of the two corporations, whereby the action against CIF was to be dropped and the action against the remaining defendants continued with the understanding that, if a judgment is recovered against PIMCO, the latter would bring action against Hankin and his former associates (JA 49, SA 112-4, 131-4). From that point on, PIMCO was carried as a party defendant *pro forma*. In the Court of Appeals, PIMCO entered no appearance and filed no brief. The real and only Respondent herein is Gregory Hankin.

[2] Soon afterwards, Hankin resigned his offices in PIMCO and CIF. In anticipation of his resignation, Mr. Thornsjo requested him to continue defending the corporations (SA 130). Upon learning of the arrangement entered into, Respondent filed a motion for leave to withdraw as attorney for the corporations (SA 135-8). The motion was granted, "good cause for said motion having been shown" (SA 153). Respondent continued to act as attorney *pro se* until his departure for Europe, when his present attorney, Mr. John V. Long, entered his appearance and argued the case.

which included a motion to dismiss and for summary judgment (JA 13-4). He challenged the complaint for breach of contract as frivolous, since there was no contract between him and Petitioner's decedent for the breach of which an action could be maintained. His further defense was that the complaint was, if anything, an action in tort alleging that he had wrongfully induced PIMCO to breach its contract with the decedent, but that such a right of action did not survive the decedent.[3]

In paragraph 3 of his answer, Hankin adopted all of the defenses in PIMCO's answer; namely, (1) that the complaint was defective in that it failed to state that the decedent was ready, willing and able to perform his part of the agreement (SA 53-4), (2) that there was no such provision in PIMCO's by-laws as alleged in the complaint (SA 54-5, 67-8), (3) that under PIMCO by-laws, Respondent *could not* withhold decedent's reelection to the Board (SA 61, 68), (4) that Respondent *did not* withhold decedent's reelection, since he was *unanimously* renominated for a full five year term (SA 62, 72), (5) that the decedent resigned voluntarily (SA 62, 73) and (6) that the claim asserted in the complaint was a partnership claim of the firm of Chapman, Wolfsohn and Friedman, which had been settled by the surviving partners (JA 19, SA 65-6).

Petitioner opposed Respondent's motion for summary judgment (JA 22-3), but did not deny or put into issue any of the facts stated in the answer. Instead,

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[3] In the District Court, Petitioner rejected this view, insisting that "*the complaint is a suit upon a contract*" (JA 26). In the petition herein Petitioner states that "Respondents had wrongfully terminated • • • the contract" (Pet. p. 4).

she filed her own motion for judgment on the pleadings and for summary judgment (JA 24-31).

On May 7, 1962, the District Court entered an Order granting Respondent's motion for summary judgment and denying Petitioner's motion (SA 78).

On May 11, 1962, the District Court on Petitioner's motion granted a thirty day extension of time within which to file a motion to vacate and reconsider the Order of May 7, 1962. On June 11, 1962, Petitioner filed such a motion, claiming "newly discovered evidence." This motion was denied on October 12, 1962 (JA 52). On November 3, 1962, Petitioner filed a Notice of Appeal from the Order of October 12, 1962, that is, from the Order denying reconsideration (JA 52). No appeal has ever been taken from the Order of May 7, 1962.

On May 29, 1963, the Court of Appeals rendered its decision (321 F. 2d 393). Treating the appeal as having been taken from the Order of May 7, 1962, it held:

> "The notice of appeal being untimely filed, this court lacks jurisdiction and the appeal must be dismissed."

However, treating the appeal as having been taken from the Order of Oct. 12, 1962, the Court *affirmed* the disposition of the case by the District Court, and in this connection held:

> "The motion under Rule 60(b) addresses itself to the discretion of that court, and, after studying the record as made, including the alleged newly discovered evidence, we find no abuse."

Petitioner filed a motion for rehearing by the Panel of the three judges who rendered the decision and by

the Court *en banc*. The Panel denied the motion on August 1, 1963, and the Court *en banc* denied it on September 18, 1963.

ARGUMENT

Respondent submits that the Court of Appeals reached the correct result on both grounds, although it was not necessary to consider the Notice of Appeal as an appeal from the Order of May 7, 1962. So emphatic was Petitioner's determination to appeal from the Order of October 12, 1962, and not from the Order of May 7, 1962, that her counsel excluded this Order from his so-called "Joint Appendix." It was included in the Supplemental Appendix (SA 78) by Respondent over Petitioner's objection that anything beyond the matters designated by her was irrelevant to the appeal. This distinguishes the case at bar from *Thompson* v. *Immigration Service,* U.S. , decided January 6, 1964, where an appeal was taken from the original order, as distinguished from an order denying rehearing. Petitioner's statement (Pet. p. 6, para. 2) that the appeal was taken from the Order of May 7, 1962, must be deemed an inadvertent error, since Item 8 on page 5 of the Petition correctly states that the appeal was from the Order of October 12, 1962.

I. Treated As An Appeal From the Order of May 7, 1962, the Notice of Appeal Was Untimely Filed and the Court Lacked Jurisdiction

Rule 73(a) of F.R.C.P. prescribes *how* and *when* an appeal may be taken, namely, by *filing a notice of appeal* within *30 days* from the "entry of the judgment appealed from". It then provides:

> "The running of the time for appeal is terminated by a *timely* motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed * * * commences to run and is to be computed from the entry of any of the following orders made upon a *timely* motion under such rules: [among them] * * * denying a motion for a new trial under Rule 59." (emphasis supplied)

Rule 59(b) F.R.C.P. requires that a motion for a new trial (which includes a motion for reconsideration or rehearing) "shall be served not later than 10 days after the entry of the judgment."

The motion for reconsideration in this case was not filed by May 17, 1962, within the time prescribed by Rule 59, hence the running of the time for appeal was not extended under Rule 73(a). The Notice of Appeal filed on Nov. 3, 1962 was thus too late to bring the appeal within the jurisdiction of the Court of Appeals.

Petitioner makes it appear that this application of the Rule would work a hardship, because at the time when the Order of May 7, 1962 was entered, her attorney was at the hospital "recovering from an illness involving major surgery" (Pet. pp. 4, 6, 7, 9, 10). No question of hardship is involved. Despite the 30 day extension for filing a motion to reconsider the Order of May 7, 1962, Petitioner could still have filed a Notice of Appeal from this Order on or before June 6, 1962. Since her attorney was not disabled from filing a motion for extention of time on May 11, 1962, nor from filing a 13-page motion for reconsideration on June 11, 1962, it is reasonable to conclude that he was not disabled from filing a 1-page form of Notice of Appeal by June 6, 1962. Had she filed a Notice of

Appeal on or before June 6, 1962, and followed it up by the Notice of Appeal from the Order of Oct. 12, 1962, denying reconsideration, she would have come within the decision of this Court in *Foman* v. *Davis*, 371 U.S. 178.

Petitioner argues that the time for appeal should be deemed extended because she had been "lulled into a false sense of security" by the order of the District Court granting an extension of time (Pet. p. 8). Unless the time is extended, Petitioner claims, lawyers will be unable to rely on the decisions of the District Court judges, and "the administration of justice will be seriously handicapped" (Pet. pp. 8, 9, 10). This magnifies the consequences beyond all reason.

Petitioner erroneously treats of the extension of time for filing a motion for reconsideration as if that involved a representation on which she relied to her damage. The District Court did not invite either the motion to extend the time or the motion for reconsideration. There certainly was no implied promise or representation by the District Court that, when it granted the privilege of filing a motion for reconsideration out of time, there would also be granted an extension of time for the filing of Notice of Appeal. Furthermore, Petitioner could not have relied on any action of the District Court, since she never appealed from the Order of May 7, 1962. In this respect, also, the case at bar differs from *Thompson* v. *Immigration Service, supra.*

Nor can it be said that a motion for reconsideration is a pre-requisite for appeal and that an extention of time for filing a motion for reconsideration is an empty gesture, unless the time for appeal is also extended. A motion for reconsideration serves a

purpose sufficient unto itself. Had Petitioner in this motion shown that she did have a good cause of action and that the "newly discovered evidence" raised a genuine issue of fact, the District Court might have reconsidered[4] and vacated the Order granting summary judgment before any notice of appeal was filed. Had the District Court failed to do so, the Court of Appeals would have ruled, upon review of the Order of October 12, 1962, that there was abuse of discretion. But such was not the case. Petitioner's disappointment stems, not from any failure to extend the time for appeal, but from the deficiency in her own case. There was never any basis for her action, either in law or in fact. Her assertion that the Court of Appeals abused its discretion (Pet. p. 7) is wholly without merit, as is also her extravagant claim (loc. cit.) that she was denied "due process of law."

Petitioner seems to argue that her right of appeal stems from Respondent's failure to object to her motion for extension of time (Pet. pp. 5, 6). Respondent must confess that, throughout the proceedings below, he was loathe to press any technical rules against Petitioner. Respondent's aversion to taking advantage of Petitioner's failure to comply with the Rules was carried even to the proceedings in the Court of Appeals despite all that had transpired. In the course of the oral argument, Respondent's attorney stated that he preferred to have the case considered on

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[4] Obviously, the statement of the Court below that the motion for rehearing came too late to be "considered" was *obiter dictum*, not necessary for the decision. The *ratio decidendi* was that the motion came too late "to interrupt the running of the time for appeal." In a larger sense, the entire treatment of the appeal as being from the Order of May 7, 1962, was *obiter*, since the only appeal taken was from the Order of October 12, 1962.

the merits. Respondent's indulgence, however, did not confer jurisdiction on the Court of Appeals to review the Order of May 7, 1962, from which no appeal had been taken.

II. There Was No Abuse of Discretion in Denying Rehearing

The Court below then treated the Notice of Appeal as being what it was on its face; namely, an appeal from the Order of October 12, 1962, denying reconsideration. Thus, the Court of Appeals did exercise jurisdiction and it affirmed the Order of the District Court.

It is not customary, and it is not necessary, for the District Court to write an opinion denying a motion for reconsideration. It is sufficient if there exists a reasonable ground for the denied. In this case, the reasons supporting the disposition of the District Court are many. In the Court below, Respondent pointed out ten good grounds for the denial of Petitioner's motion. It is sufficient here to point out two of them.

(1) The motion for reconsideration was said to be based on "newly discovered evidence" (JA 32-34); namely, the minutes of PIMCO's Executive Committee meeting of Feb. 11, 1959 (JA 37). But this "alleged newly discovered evidence" (as the Court below characterized it) was not evidence of decedent's involuntary resignation or of a continuing demand for $10,000, as represented by Petitioner. The minutes made no mention of any money demand (SA 101). If anything, it was evidence corroborative of PIMCO's defense that Mr. Wolfsohn had resigned voluntarily (SA 62, 73).

(2) Assuming that all of Petitioner's allegations were true, they were definitely irrelevant and immaterial. They did not create a contract for the breach of which an action could be maintained against Respondent; they did not create a right of action in tort which would survive the decedent, notwithstanding the provision of Title 12, Sec. 101, D.C. Code, 1961; and they did not create any genuine issue of fact as to any of the defenses in PIMCO's answer adopted by Respondent.

It cannot be said, therefore that the District Court abused its discretion in denying the motion for reconsideration. Petitioner's suggestion (Pet. p. 10), that the ruling of the Court below in this respect should be disregarded, merits no reply.

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN V. LONG
Attorney for Respondent Hankin

GREGORY HANKIN
Of Counsel

Office-Supreme Court, U.S.
FILED
FEB 7 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 680

REBECCA SIMON WOLFSOHN, Executrix for the Estate of Joel David Wolfsohn, Deceased, *Petitioner*

v.

GREGORY HANKIN, *pro se*, and PROFESSIONAL INVESTMENT MANAGEMENT COMPANY, *Respondents*

PETITIONER'S REPLY TO RESPONDENT HANKIN'S STATEMENT IN OPPOSITION

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Attorney for Petitioner

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Petitioner's Suggestions

Grave and very bizarre circumstances are now before this Court to guide it in its deliberations on the instant petition for a Writ of Certiorari. By reason of the

admissions in respondent Hankin's brief and record in this Court, it is petitioner's fervent prayer and hope that when heard on the merits, said admissions will prove a means to curtail further excesses that have caused petitioner irreparable injury and wholly unnecessary amazing injustice and hardships. It should be noted immediately and pointed out to this Court that the last day for filing the record was December 17, 1963.

Respondent Hankin's record was previously ordered deleted and amended by the Court of Appeals on motion of his former attorney, Frederick A. Ballard, Esq., before he withdrew.[1] However, on oral argument May 13, 1963, without prior notice, petitioner was taken by surprise to learn the identical brief was before the court, amended and deleted only by substituting its cover, without Mr. Ballard's name leaving the identification "Gregory Hankin, Attorney, Pro se," and the

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[1] "1. Appellee, Gregory Hankin, moves for leave to amend his typewritten brief filed herein on March 16, 1963, by deleting question No. 4 of the Questions Presented, Part III (pages 31 to 38), and the references thereto on pages iv and 3 of the typewritten brief. The ground for this motion is as follows:

The undersigned counsel for appellee Hankin has recently been retained to argue this case on the merits, the case having been hitherto conducted by Mr. Hankin *pro se*. • • •"

"And it appears that such question should be considered independently of the merits of the present appeal.

Frederick A. Ballard
For Appelee, Gregory Hankin"

real and proper argument on the questions presented in the appeal was not made.[2]

The "S A" appendix references in respondent Hankin's instant brief, covering pages 80 to 184 of his record, is file stamped over two months after appellant's brief and even reply brief was filed below. The legerdemain used by respondent Hankin to include it in this Court was to counter-designate it as "The Supplemental Joint Appendix filed by the *appellant* herein, ' and camouflage it by bearing blue covers (appellant) instead of grey (appellee), and he also includes the name of Frederick A. Ballard as of counsel. The one and only joint appendix filed by appellant in this court appears herein as petitioner's record from pages 1 to 52, inclusive.

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[2] "STATEMENT OF QUESTIONS PRESENTED

1. Was summary judgment entered erroneously for three* appellees and later denied reconsideration thereof of the complaint and jury demand, pending motion to strike prolix pleadings controverting substantive issues of material facts of the complaint, but none in compliance with Rule 56, Fed. R. Civ. P and Local Rule 9, disputed by appellant's competent affidavits? The court acting on appellees' inappropriate record, resolved complex and involved issues within the peculiar knowledge of appellees, while in a fiduciary relationship including decedent's partnership and corporate rights (without the partnership agreement itself), and a controverted illegal settlement agreement, and whether a resignation under decedent's employment agreement was voluntary or involuntary.

2. In the same context, was summary judgment for appellant erroneously denied upon disclosure that the pretended and elaborate theory of an oral and voluntary resignation to the individual appellee, was sham and spurious by the discovery of previously concealed minutes of February 11, 1959, supporting the written demand upon the PIMCO Board, that decendent's resignation was involuntary.

---

* There are now only two remaining appellees (See JA—49)"

Respondent Hankin's counter-designated record upon which his brief relies, containing scurrilous and derogatory material, filed late on December 18, 1963.

There Never Was a Bona Fide Issue of An Untimely Appeal Since Respondent Hankin Seeking a Judge of His Own Choice Forced Continuances in the District Court Until November 1, 1962. Notice of Appeal Was Filed November 3, 1962.*

In the light of *Thompson* v. *Immigration Service 496*, this Court decided January 6, 1964 (7th Cir.) — F. 2nd — the Court of Appeals erroneously rejected the uncontested petition for reconsideration and en banc (Petn. Rec. p. 61-73) which relied on the principles and spirit of *Harris Truck Lines* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215. The instant petition emphasized that the dismissal of the lower court was in conflict with Harris, supra (Petn. Rec. pp. 9-10).

Here the hardship was far greater than in Thompson, far greater than in Harris, because the Motion Judges of the Court of Appeals on January 25, 1963, had originally denied the motion to dismiss the appeal (Petn. Rec. pp. 53-56), long before the costly proceedings that followed. Moreover, the very circumstances pertaining to service and filing that prompted the dissent in Thompson do not exist. Here the mandatory requirements were fully met. Here there was no question of excusable neglect, because in fact there was no neglect. Opposing counsel were advised together with the court that the motion was dictated by petitioner's counsel from the hospital where he was recovering from an illness involving major surgery and endorsed their

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* See Footnote 3—(Addendum from Resp. Hankin Rec. p. 239)

approval upon the motion for the continuance. The motion, filing, and order were all accomplished within 4 days of the entry of judgment on May 7, 1962, and fully accomplished without any further continuances. There was still 26 days left to appeal. There was no ambiguity of intent to appeal.

If the trial court had chosen to deny the request of so timely a motion under these unique circumstances, there was still 26 days left to secure associate counsel, or petitioner herself could have secured another attorney to protect her interests. Is there any reasonable doubt in any mind that a lawyer having his client's interest at heart sufficiently to endeavor to protect her within four days after entry of judgment from a hospital bed would have failed to do so within the remaining 26 days?

This Court in *Thompson, supra* (citing *Harris*) said "a motions judge was entitled to 'great deference by the reviewing court' in the light of the 'obvious great hardship to a party who relies upon the trial judge's finding.'" Having been put on notice by the action of its own motions court in denying appellee's motion to dismiss the appeal January 25, 1963, the Court of Appeals should have approached the dismissal, and overruling of the District Court with reluctance and extreme caution, which it failed to do. It read into petitioner's appeal an erroneous view, contrary to the facts, something that did not exist. Petitioner was unfairly prejudiced thereby and suffered irreparable injury and hardship.

Respondent Hankin drafted the order denying the motion to vacate the summary judgment entered on May 7, 1962, and jury demand on October 20th, 1962. It could not be appealed from the next day because

respondent had other motions which he wished to be heard simultaneously, and in seeking a judge of his choice compelled continuances until November 1, 1962.[3] The notice of appeal was filed 2 days thereafter (Petn. Rec. J.A. p. 52).

In the Court of Appeals the concept that the notice of appeal was untimely was an afterthought, subsequent to filing an answer to appellant's motion for summary reversal. The jurisdictional statement by appellee Gregory Hankin in his lower court brief states "The order which was sought to be reconsidered was rendered on May 7, 1962."

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[3] "ADDENDUM—Note With Reply As To Record No. 17440

The Notice of Appeal was filed November 3, 1962. Appellant requested and was granted a forthwith order on November 5, 1962. The failure of the lower court to release the record, made a preliminary record necessary and explains the appendix attached to Appellants Motion for Summary Reversal. The order on the hearing held November 1, 1962, has now been signed, and the lower court's complete record will be released and filed, either December 11th, or December 12th, 1962, in apt time to be considered with pending motions in this court.

The circumstances that divided the record was a letter from Appellee Gregory Hankin, dated September 11th, 1962, objecting to the hearing before Judge Leonard P. Walsh, on September 28, 1962. At the hearing on November 1, 1962, reset before Judge McLaughlin, Mr. Hankin, without previous notice, introduced an alleged counter-claim at the rate of $105.00 per hour, for 228 hours, or $23,940 for fees, on the theory, (based upon the pleadings in the case) that it had matured after judgment.

The defendant Consumers Investment Fund, Inc. has been dismissed from these proceedings.

The defendant, Professional Investment Company, appears herein without counsel as appellee, for the reason that Appelee Gregory Hankin, has filed a motion to withdraw as counsel, leaving him to appear Pro Se, which has been granted.

Fred I. Simon"

(See Respondent Hankin Rec. p. 239)

In *Foman* v. *Davis*, 371 U.S. 178, 180-182 (1962), this Court concluded that the manifest intention of the petitioner to appeal and challenge the dismissal, could be determined both as to the dismissal and denial of the motions on the statements of points, and with all the foregoing the petitioner complied.

Here through a rare combination of unique circumstances the clear and unequivocal intention to appeal of the petitioner is supported by the counter-designated record of respondent Hankin at the "Addendum" (p. 6, supra), but transposed (although petitioner's letter was written 3 months later), to make the false implication in the first of Hankin's lower court brief (p. 7) "In this case an attempt was made to have the motion for reconsideration submitted to another judge." A serious question arises as to how they became evidence! (Resp. H. Rec. pp. 180-183)

And finally a far more cogent reason from a lawyer's standpoint—those first facts surrounding a transaction—the *res gestae*, that points a steady finger to the truth. Here again respondent Hankin's counter-designated record has the answer, and this time it is in petitioner's "Motion for Summary Reversal" filed December 5, 1962 (Res. H. Rec. pp. 185-221). If in the mind of respondent there was an untimely appeal in either the District or the Court of Appeals, then it should have been reflected the very next day in his opposition statement entitled, "Appellee's Motion to Strike Motion for Summary Reversal" filed December 6, 1962 (Resp. H. pp. 223-231). Those were the first two documents in the proceedings below. That was the time when either side would have spoken about an untimely appeal if it really had existed, and that was the time the Court of Appeals should have been

shocked out of its torpor with that ugly Hankin phrase, "stripped of all scandalous and irrevelant matters, the complaint might be found to state no cause of action." (Resp. Rec. p. 227). It was the lower court's duty immediately to seek the truth, and it failed again and again to do so! The concept of an untimely appeal by respondent Hankin is a spurious after thought. That it is fiction and known to be such by respondent Hankin is supported by the record the Court of Appeals studied, and that is why petitioner is in this court praying for a Writ of Certiorari.

Petitioner's Motion of June 11, 1962, Under Rule 60(b) Disclosed Serious Fiduciary Violations by Respondent Hankin. Discovered for First Time Subsequent to Instant Lawsuit at Annual Meeting of Stockholders; Was Both Newly Discovered and Fraudulent Evidence and Both District Court and Court of Appeals Erred in Not Ending the Litigation and Alleviating the Hardships of Petitioner.

The relevant portion of Rule 60(b)(3) as another ground to grant relief from a final judgment, ignored by the Court of Appeals in the instant case reads:

> "(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

Petitioner, of course, was fully aware of the fact that respondent Hankin's pretense of an untimely appeal was sham, but in her petition for a Writ of Certiorari, she chose to argue on other adequate grounds appearing in the petition. The confusing and uncertain phrase concluding the Court of Appeals opinion was treated by petitioner as "a gratuitous statement not essential to the appeal" (Petn. Br. p. 10).

Respondent Hankin (Res. H. Br. p. 9) elected to do otherwise. He states the Court of Appeals exercized jurisdiction, treated the Notice of Appeal as an appeal from the Order of October 12, 1962, and throughout his brief states there was no appeal taken from the judgment of May 7, 1962. The judgment of the Court of Appeals, however, states, "* * * the appeal from the judgment of May 7, 1962, is hereby dismissed * * *." Further (Res. Br. p. 9) and elsewhere, he discloses the actual basis upon which summary judgment was entered in the District Court was upon controverted facts in the pleadings. It was the duty of the Court of Appeals to consider petitioner's reply to respondent Hankin which in justice and fairness, and surely as a matter of law, could have and should have stopped respondents then and there.[4]

Respondent argues at page 9 of his brief the crucial concealed minutes of February 11, 1959, and states further the factual dispute in the pleadings that Mr. Wolfsohn resigned voluntarily. He did not state that at page 207 of his counter-designated record is petitioner's statement:

> "1. The minutes of February 11, 1959, previously concealed by appellees were crucial and disclosure belied appellees' refuted theory and defense, which was that nothing had transpired between January 19, 1959 and March 9, 1959." (Resp. Rec. p. 207)

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[4] "1. Appellees' frivolous status in this appeal is emphasized by their continued attempt to justify their own version of the factual dispute. In a motion for summary judgment that is the very antithesis of what is proper. It would only be correct to show that no controversy exists. It is the existence of a controversy on the issues rather than the absence of one; in a large measure it is the basis of this appeal by appellant. Appellees' motion to strike admits matters of substance, is without equity and devoid of law." (Pet. H. Rec. p. 232)

Respondent Hankin referred to the demand by deceased, a two-page document signed by him, bearing his initials with the notation in his handwriting, "Read by JDW to Board Meeting Jan. 19, 1959" (JA pp. 47, 48). It concludes:

> "I therefore involuntarily tender my resignation, and demand under the terms of my contract, that I be paid promptly the sum of $10,000.00 due me for the balance of my contract.
>
> /s/ Joel D. Wolfsohn"

Mr. Hankin did not disclose the minutes of January 19, 1959 of the Board of Directors of PIMCO included:

> "During the course of this discussion Mr. Wolfsohn tendered his resignation as Vice President, Secretary and Director." * * * "Adoption of the resolution was accompanied by a request that Mr. Wolfsohn withdraw his resignation. This he declined to do * * *. If it was not withdrawn then a special meeting of the Board would be called to consider the situation." (Res. H. Rec. pp. 103-104)

As evidence of his good faith in this Court, he should have said that the affidavit of Gregory Hankin, President of PIMCO, filed February 7, 1962, upon which summary judgment was rendered alleges:

> "10. * * * the affiant did state, in December 1958 or in January 1959, that he would not support Mr. Wolfsohn's re-election to the Board. It was because of this statement that the decedent appeared at the meeting held on January 19, 1959, tendered his resignation and read a statement defending his work and effort for the Corporation and demanded the sum of $10,000 * * *.

> 11. No special meeting was held before the annual meeting of the stockholders on March 9, 1959 * * *
>
> /s/ Gregory Hankin" (JA p. 16-17)

In support of his motion to secure $1,000 attorney's fees, respondent had stated:

> "(b) The defendant Gregory Hankin made all books, papers, documents etc., available to the attorney for the plaintiff. At least this much must be admitted by him." (Resp. Rec. p. 131)

Said respondent did not state that in the Court of Appeals record, now in the Supreme Court, respondent Hankin admits:

> "The Minutes of the Stockholders and the Board of Directors of PIMCO were in one book; while the minutes of the committee (Executive and Investment) were in another book. * * * The situation was so tense that Mr. Hankin forgot all about the minute book of the Committee and Mr. Simon never did get to see it." (Resp. Rec. p. 270, 271).

The original complaint rested on an employment contract with PIMCO and Mr. Wolfsohn's demand for $10,000 under its terms. PIMCO obviously was a client of Chapman and Wolfsohn and its legal counsel. Respondent Hankin had an identical employment contract except that he was a full-time employee at $100.00 per week or $5,000 per year (JA p. 16). Mr. Wolfsohn's employment contract was at the rate of $2,500 per year (JA p. 16). Respondent Hankin's status was never that of a defending attorney, but as his own record shows, his status was:

> "(c) The defendant Gregory Hankin violated fiduciary relationship and responsibilities" (Resp. Rec. p. 256).

After the annual meeting of stockholders, a motion to vacate was made on June 11, 1962, which was denied without a hearing and without an opportunity to amend the complaint. If the hearing had been granted, the complaint would have been amended as a class suit in the manner shown at his record, p. 255.

Plaintiff's grounds were:

> "(e) The financial manipulation of the said Hankin, while in said fiduciary relationship to the stockholders, depressed the value of the stock from $10 per share to 30¢ per share, to achieve secret gain for himself." (Resp. Rec. p. 256).

That information was before the District Court and the Court of Appeals, and should have been sufficient grounds, supported by substantial documentary evidence and fraudulent misconduct of respondent, who utilized the opportunity of Mr. Wolfsohn's untimely death to perpetrate a tremendous hoax upon the stockholders and thereafter upon the courts below.

The demand presented January 19, 1959, to the PIMCO Board refutes very clearly respondent Hankin's representation to this Court at page 3 of his brief, as to what PIMCO's by-laws really provided. The decedent Mr. Wolfsohn states:

> "At the meeting of the Executive Committee on Monday, January 12, without any prior notice to me, he announced that he could not recommend my re-election to the Board, and pointed out that under the By-laws, only Board members may hold office. This then I construe as being removed from office involuntarily and in violation of my contract with Professional Investment Management Co."

The source for Mr. Wolfsohn's information then was from PIMCO's bylaws, as he knew them, and as

they existed during his lifetime and within his knowledge. Moreover Mr. Hankin said so! (JA p. 48)

This then was respondent Hankin's *"piece de resistance."* With the whirling weathervane of kaleidoscope theories, from court to court, and between motions, for petitioner it seemed to be a good idea not to disturb the record.

Lawyers, if they feel a complaint is defective and states no cause of action, have recourse under Federal Rules, if they have had more than one case under their belt. Respondent Hankin chose to try for an additional $1,000,[5] (later amended to $23,940).

Respondent Hankin's Record in the Supreme Court Discloses He Planned to Secure $50,000 Through the Merger Instead of $25,000.

The decedent died on July 9, 1961 (JA 9). The complaint was filed after Oscar L. Chapman, respondents' former counsel, turned the matter over to her present counsel to enforce collection (JA 2-3). Defendants' pleadings upon which summary judgment, adverse to plaintiff, was argued prior to the stockholders annual meeting.

On March 25, 1963 PIMCO notified the Clerk of the Court of Appeals that its interests were not being

---

[5] "The defendant further submits that the Court may, and in the opinion of defendant should, of its own motion take disciplinary action against Mr. Fred I. Simon, attorney for the plaintiff, for the repeated offenses committed by him against the dignity of the Court, in the following particulars:

1. By including false, scandalous and irrelevant matter in the complaint (to wit, in paragraph 5 thereof), and by causing the plaintiff to file an affidavit containing false, abusive and scandalous matter (to wit, in paragraphs 5, 6 and 7 thereof)." Thereafter respondent repeatedly stated, "That paragraph 5 of the motion which states Mr. Hankin received $72,000 was libelous innuendo."

represented in accordance with the letter appended hereto at the end of this brief. The letter was then supported by affidavit of Douglas Thornsjo of PIMCO and associated companies.

Petitioner in preparation of the instant appeal reluctantly examined respondent Hankin's counter-designated record. At page 272 thereof the following appears:

> "Mr. Hankin took all of his compensation for salary and fees at the rate of $10.00 per share."

The PIMCO stock was computed "December 31, 1960 —30¢ per share, and:

> "In January 1961, Mr. Hankin became entitled to an option to purchase 5,000 shares of stock in Consumer Investor Planning Corporation at $1.00 per share, or (at the option of the corporation) to $50,000. In the contract with Investment Policies, Inc. he agreed to give up his commissions and his option, leaving only the salary of $25,000."*

Since this was a fast settlement after suit was filed with no disclosure to the stockholders, in which practically all the members of Mr. Wolfsohn's family and friends were interested, these new disclosures indicate that respondent Hankin indulgently gave up $25,000, which never would have happened, of course, if suit on the simple contract and demand due the widow of decedent had been paid.

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* The Court of Appeals was advised (Resp. Rec. p. 236): "The Court of James Blacksone, *Ken. Lib. Assn.* v. *Gulf M. & O.R. Co.*, 264 F. 2d 445 said, 'Majority stockholders of a corporation occupy a fiduciary relationship toward minority stockholders, and when purchasing their shares are under an obligation to divulge all material facts."

In addition to the usual definition of hardship of injustice, oppression and embarrassment, etc., Webster's Unabridged 2nd Edition defines "hardship": "Hard circumstances of life. A thing hard to bear."

The Court of Appeals Misconceived the Status of PIMCO as Respondent.

It is not the function of petitioner to get involved with disputes between respondents and their attorneys unless legal transgressions require as a matter of duty and as an officer of the court, or as in this case where legal rights are directly affected. Here these matters are of major legal significance affecting petitioner. The Court of Appeals treated PIMCO's failure to file a brief as tantamount to dismissal, despite the fact that summary judgment was entered jointly, because of respondent Hankin's refusal to represent it.

The docket entries of the Court of Appeals are:

5-13-63 Argued before Edgerton, Senior Circuit Judge, and Wright and McGowan, Circuit Judges. The court announced denial of appellant's motion to direct Clerk to enforce Rule 14(b) for failure of appellee Hankin to comply with Rule 14(a).

5-13-63 Statement of Roger W. Schnobrich for the record (fiat of H. W. Edgerton)

5-15-63 Per Curiam order denying appellant's motion to direct Clerk to enforce Rule 14(b) for failure of appellee Hankin to comply with Rule 14(a).

Based upon the foregoing, PIMCO through Roger W. Schnobrich, General Counsel for PIMCO, was granted leave to file its typed statement for the record adopting Hankin's arguments that summary judgment

was granted properly, which showed that they admitted respondent Hankin had not supplied any files or information upon which they could file a brief. However, that immediately supports the fact that the judgment entered in this case is clearly erroneous on its face, since it postulates that Hankin alone remains. Respondent Hankin's brief (p. 2) states, "The real and only Respondent herein is Gregory Hankin," and was the basis for embarrassing garnishment proceedings by him alone on Mrs. Wolfsohn's bank account, despite request for stay in apt time and after this petition was filed.

The surprise opening ruling by the Court of Appeals restored appellee Hankin's brief to the files. Its contents is without sanction by any other circuit and is clearly in violation of Rule 19(1)(b) Supreme Court Rules. As can be determined from the statement of the questions presented (supra, page 3) the fundamental impropriety of the trial court resolving a controverted dispute *without the partnership agreement itself* in entering summary judgment was a vital issue:

> "The partnership agreement was not produced in the lower court. What did the lower court interpret? What is there for the Court of Appeals to produce?" (Resp. Rec. 185 at 203)

Despite the foregoing, a typed paper bearing no signatures entitled "Partnership Agreement" appears at pages 41 to 44 inclusive, at page 38 appears "Frederick A. Ballard, Of Counsel," and it no doubt shocks all law libraries. It is not even in that grotesque book stretching from pages 82 to 184, described as respondent's "SA" appendix. If that is the only record that the Court of Appeals studied, then sand has been substituted for integrity in the instant proceedings.

Conclusion

It is respectfully urged that Writ of Certiorari be granted, and an appropriate order in connection therewith.

FRED I. SIMON, ESQ.
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Petitioner.

TELETYPE WA-207

Professional Investment Management Co.

517 FIFTEENTH STREET, N. W. • WASHINGTON 5, D. C.
NEW ADDRESS--FIRST NATIONAL BANK BLDG., MINNEAPOLIS 2, MINN.

March 25, 1963

Nathan J. Paulson, Clerk
United States Court of Appeals
For the District of Columbia Circuit
Constitution Avenue and John Marshall Place N. W.
Washington, D. C.

Re: Wolfsohn vs. Hankin and Professional Investment Management Co.
Civil Number 17449
Our File Number - LF-2361 B

Dear Mr. Paulson:

This letter is written pursuant to a telephone conversation between Douglas Thornsjo, President of Professional Investment Management Company ..... your Deputy Clerk handling the above noted case of this afternoon. Your Deputy is sending to us applications to practice before your Court.

For reference, I might explain briefly that Mr. Hankin had been representing this corporation, as well as himself, earlier in this litigation. Mr. Thornsjo was advised Friday that Mr. Hankin had withdrawn as counsel for the corporation and that no one, in fact, had appeared in this appeal on its behalf. I wish to reiterate that this information was received by corporate officers late Friday afternoon for the first time. You can understand our consternation in trying to determine a course of action when we learned that time for filing our brief expired tomorrow.

You may be assured that applications for admission to practice before your Court for the undersigned will be submitted immediately upon receipt of the forms from your Deputy. The enclosed original and three copies of a motion to extend the time for filing Appellee--Professional Investment Management Co. brief in this matter for thirty days is respectfully submitted with the understanding concerning the above mentioned application for admission to practice.

We appreciate that this is a strange request, but ask the Court's indulgence by reason of the circumstances involved. Your attention to this matter will be greatly appreciated.

Very truly yours,

Donald C. Sheehan

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 680

REBECCA SIMON WOLFSOHN, Executrix for the Estate of JOEL DAVID WOLFSOHN, Deceased,
Petitioner,

v.

GREGORY HANKIN and PROFESSIONAL INVESTMENT MANAGEMENT COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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PETITION FOR REHEARING

GREGORY HANKIN
Attorney pro se
3020 Tilden St. N.W.
Washington, D. C.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

IN THE

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PETITION FOR REHEARING

Respondent Hankin (hereinafter referred to as Respondent) petitions this Honorable Court to reconsider the judgment entered in the above entitled matter, and Respondent's suggestion to strike Petitioner's Reply Brief, and as reasons therefor assigns as follows:

I. AS TO THE JUDGMENT ENTERED.

1. On February 24, 1964, the Court granted a writ of certiorari in the above matter and reversed the judgment of the United States Court of Appeals for the District of Columbia Circuit. In reversing the judgment upon the authorities cited, the Court held that the appeal had been timely taken, and that the cause must be remanded to the Court of Appeals for adjudication on the merits.

2. Respondent takes no issue with the Court's action in granting the writ and in reversing the judgment of the Court of Appeals. He submits, however, that no useful purpose would be served by remanding the cause to the Court of Appeals, because there is clearly no cause of action.

(a) The complaint for breach of contract was brought against Respondent who was not a party to the contract; hence Respondent was not a proper party defendant.

(b) Treating the complaint as an action in tort, the right of action (if any there was) did not survive the decedent, and his Executrix was not a proper party plaintiff.

(c) These two propositions, which must be resolved in favor of Respondent, stand as insurmountable obstacles to a consideration of any substantive questions in the case. It would be an idle gesture to require the Court of Appeals to consider the merits, when there are no merits to be considered.

3. In this view, the judgment of the District Court must be affirmed, and the Order of this Court should therefore read:

> The judgment of the Court of Appeals is reversed (on the authorities cited) and that of the District Court is affirmed.

This would dispose of the case in its entirety, including the action brought against Professional Investment Management Company (PIMCO).

II. AS TO PETITIONER'S REPLY BRIEF.

Respondent, a member of the bar of this Court for over 36 years, deems it his professional duty again to request and now moves, that the Reply Brief filed by Mr. Fred I. Simon, Attorney for Petitioner, be stricken from the files of this Court and that the Court exercise its powers of supervision, and point the way for the courts below to act in similar circumstances.

1. While presenting this Petition for Rehearing as a matter of professional duty, Respondent does not pretend that he has not been personally hurt by Mr. Simon's repetitious scandalous and libelous abuses. For over two years in practically every paper filed by him, Mr. Simon has pursued a course of vilification, as if trying his utmost to provoke Respondent into action unbecoming a gentleman and a member of the bar. He made numerous scandalous and libelous attacks upon Respondent [2], he made numerous false accusations and other false statements[3], resorting to distortions of fact[4], making state-

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[1] Although PIMCO was named as respondent in the title of the case, it is not a real adverse party herein, as was shown in Respondent's Statement in Opposition (p2n). Petitioner has also demonstrated that this is so, because no copy of the Petition for Writ of Certiorari has ever been served on PIMCO. This would have been done under Rule 33 of this Court, if PIMCO were an adverse party. However, if it is necessary to make a separate disposition of the case with respect to PIMCO, Respondent respectfully suggests that as to it, the Petition for Writ of Certiorari should be "dismissed as improvidently granted."

[2] E.g. JA 4, 10-11, 31, 32; SA 84, 85, 92, 94, 96-101, 103-6, 109-11, 117-8, 149-50; R 191, 192, 193, 195-7, 208, 216, 237; Reply Brief herein pp 8, 11, 12.

[3] E.g. JA 10-11, 24, 31, 33, 34, 35, 36, 41-2, 43, 50-1; SA 77, 83, 92, 95-7; R 194, 203-8, 210, 213-6; Reply Brief herein pp. 6, 9, 13, 14.

[4] E.g. JA 14-5, 24, 27, 30, 36, 38, 44, 45; SA 84, 98-101, 118; R 194; Reply Brief herein pp. 2, 6, 12.

ments which are not in the record[5] and otherwise violating the canons of professional ethics.[6] This continuous onslaught was not limited to Respondent, but extended to others concerned with the controversy.

(a) While Mr. Simon in numerous ways called Respondent a crook, a fraud, etc. he said the same things about the Hon. Oscar L. Chapman; to wit, that he was willing to "cheat, wrong and defraud the widow of his former partner" (SA 118).

(b) In the Court of Appeals, Mr. Simon, in his "Motion for Summary Reversal", excelled himself in vilifying the Respondent, but then he also accused District Judge Edward M. Curran of hypocrisy, charging that his ruling was prompted by "dissimulation", rather than by rules of law (R. 185).

(c) In his Reply Brief in this Court, Mr. Simon repeated many of his abusive epithets about the Respondent, but then he also charged that the Court of Appeals was without integrity, saying that "sand has been substituted for integrity in the instant proceedings" (p. 16), and he showed utter contempt by the use of such phraseology as "the Court of Appeals should have been shocked out of its torpor" (p. 8).

2. Respondent suggested in the District Court that disciplinary action be taken against Mr. Simon (SA 123-30). That Court declined to do anything (SA 153 para 5). This encouraged Mr. Simon in his course of conduct (See R. 185-221). In the Court of Appeals Respondent moved to strike Mr. Simon's "Motion for Summary Reversal" (R. 223-231). He also moved to refer Mr. Simon's professional misconduct to the Committee on Admissions and Grievances pursuant to the

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[5] R 190-4, Reply Brief herein pp. 2, 4.

[6] See R. 247-62.

Rules of that Court (R. 247-62). These motions were denied (R. 266, 268). The result that throughout the proceedings which followed, Mr. Simon was unrestrained in his abusive conduct, both in the Court of Appeals and in this Court.

If such behavior on the part of a member of the bar is condoned, one can only wonder what is to be expected of the man in the street, by way of respect for our judicial process.

Respondent believes that a contest in a court of law must proceed strictly upon the law and the facts of the case. The United States courts are not the appropriate forum for what might properly be described as a "brawl". This applies especially to members of the bar in their behavior toward each other and toward the courts. The facts herein are on all fours with those in *Duke* v. *Committee on Grievances*, 83 F.2d 890, where the Court of Appeals for the District of Columbia, quoting from a previous case, held as follows (p. 895):

> "The oath taken by the attorney pledges him to demean himself as an attorney and counsellor of the Court uprightly and according to law * * *. He has no right to attempt to cast foul and unfounded aspersions upon the character and conduct of his brother members of the bar, any more than he has to asperse and defame, without justification, the character and motives of the judge upon the bench. Especially is he without warrant in an attempt to make the records of the courts, from the lowest to the highest, vehicles of malicious scandal and libel of any member of the bar. Upon any other principle for the government of the bar, it would be impossible to conduct business with decorum and with due regard to the orderly proprieties of a court of justice. * * * The bar are entitled to be protected against such abuse of privileges by any of its brother members. Indeed, the power of disbarment, as means

of protection, would be of little practical use, if it were not applicable to such cases."

WHEREFORE, Respondent prays as follows:

1. That this petition for reconsideration be granted.

2. That the judgment of this Court heretofore rendered in this case be modified to read:

"The judgment of the Court of Appeals is reversed and that of the District Court is affirmed."

3. That the Court order that Petitioner's reply brief be stricken from the files of this Court and that it issue such further orders as it may deem just and proper.

Respectfully submitted,

GREGORY HANKIN
Attorney pro se

CERTIFICATE OF COUNSEL

This is to certify that the above petition for Rehearing is filed in good faith and not for purposes of delay.

GREGORY HANKIN
Attorney pro se